Wawasan Raya (M) Sdn Bhd & Anor v MARC Service Residence Management Corp

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-719–04 OF 2023
SEE MEE CHUN, LIM CHONG FONG AND WONG KIAN KHEONG JJCA
9 APRIL 2025

Civil Procedure — Injunction — Interlocutory injunction — Undertaking — Whether defendant required to comply with its undertaking during interlocutory injunction application to pay damages to plaintiff — Rules of Court 2012 O 29 r 1(4)

Civil Procedure — Pre-trial case management when directed by court — Filing of statement of issues to be tried — High Court did not answer agreed issues to be tried and made decision on other questions not agreed upon — Whether court's omission to answer agreed issues to be tried constituted error of law — Whether court's decision on other questions not agreed upon tantamount to legal error — Rules of Court 2012 O 34 r 2(2)(k)

Civil Procedure — Striking out — Striking out of counterclaim by High Court on its own motion — Breach of two rules of natural justice — Whether court could, on its own motion, strike out counterclaim by defendant — Rules of Court 2012 O 18 r 19(1)

Land Law — Management corporation — Duty and power — Management corporation of apartment applied for injunction to prohibit short term rental of parcels by parcel owners — High Court allowed injunction — Whether management corporation of development area could prohibit short term rental of parcels — Strata Management Act 2013 ss 2, 59(1), (2), 70(2) & (6)

The respondent was the management corporation ('the MC') of an apartment known as MARC Service Residence ('the apartment'). During the sixth annual general meeting ('AGM') of the respondent, there was a dispute on what was passed regarding agenda No 8, resolution No 3 ('resolution No 3') which stated that the unit owner and lessee shall comply with the guideline regarding short term rental ('STR') issued by the commissioner of buildings ('the COB') in line with the Strata Management Act 2013 ('the SMA') and that a penalty of RM200 would be imposed for each non-compliance to the respondent's house rules ('the HR'). In the High Court, the respondent filed an injunction against

several parcel owners including the first appellant to prohibit STR of parcels ('the suit'). Pending the disposal of the suit, the High Court had granted ex parte interlocutory injunction and subsequently inter parte interlocutory injunction to restrain the parcel owners from using their parcels for STR. The second appellant was not sued by the respondent but it rented several parcels in the apartment and was aggrieved by the interlocutory injunction, hence, applied to intervene in the suit. When the respondent consented to the intervention, the second appellant filed a counterclaim against the respondent and its members but the High Court, on its own motion, struck out the counterclaim with liberty to file afresh. In relation to the main suit, the issues to be tried as agreed upon by the parties during the pre-trial case management ('PTCM') were as followed: (a) whether resolution No 3 was voted upon during the respondent's sixth AGM ('the first agreed issue'); (b) whether the suit was filed lawfully by the respondent against the parcel owners (the defendants in the High Court) ('the second agreed issues'); (c) whether the respondent had prepared the latest HR which incorporated resolution No 3 ('r 2.1(e) of the HR') and filed the latest HR with the COB ('the third agreed issue'); (d) whether the respondent as the MC needed to obtain the mandate and consent of the members of the respondent before filing the suit against the parcel owners ('the fourth agreed issue'); (e) whether the respondent was required to comply with its undertaking during the interlocutory injunction application to pay damages to the appellants ('the fifth agreed issue'); and (f) whether r 2.1(a) of the HR (which stated that the units were constructed for private residential dwellings and shall be used exclusively for private residential purpose only) had contravened, firstly, the express condition of land use which provided that the land should only be used for a high-rise commercial building for the purpose of serviced apartments, and secondly, r 2.1(e) of the HR ('the sixth agreed issue'). The High Court allowed the suit, hence, the present appeal. The judgment of the court in the present appeal dealt with the following novel issues: (i) whether the MC of a development area could prohibit STR of parcels; and (ii) whether a court could, on its own motion, strike out a counterclaim by a defendant under O 18 r 19(1) of the Rules of Court 2012 ('the ROC') — this issue also concerned the application of the two rules of natural justice.

Held, allowing the appeal and setting aside the High Court's decision:

(1) Order 18 r 19(1) of the ROC had not expressly provided that the court could exercise any powers in the said provision on its own motion. In addition, if the court acted *suo motu* to strike out the counterclaim, the first rule of natural justice may be breached on the ground that: (a) there may exist actual bias on the part of the court; and (b) in the perception of a fair-minded and informed observer, there was a real danger of bias on the part of the court ('the first rule of natural justice'). There was also a clear breach of the second rule of natural justice when the second

appellant was not afforded a right to be heard before the High Court struck out the counterclaim (see paras 21–23).

(2) The High Court's decision on questions which were not part of the agreed issues to be tried constituted an error of law which warranted appellate intervention because: (a) it was contrary to the learned High Court judge's own PTCM direction pursuant to O 34 r 2(2)(k) of the ROC; (b) it may offend the first rule of natural justice; and (c) if the court wished to decide on an issue which had not been previously agreed to by the parties during the PTCM ('the new issue'), the court should inform all the parties regarding the new issue so as to enable the parties to prepare and submit on the new issue in accordance with the second rule of natural justice (see para 27).

(3) The learned High Court judge did not decide on the second, third, fourth and fifth agreed issues to be tried. Such an omission tantamount to a legal error on the part of the High Court (see para 28).

(4) There was nothing in the SMA and the Strata Management (Maintenance and Management) Regulations 2015 ('the SMR'), either expressly or by necessary implication, which prohibited STR. In fact, there was not even a definition of STR in the SMA and SMR. The sale and purchase agreements and the deed of mutual covenants signed between the purchasers and the developer also did not contain any prohibition of STR. In addition, there was nothing in s 59(1)(a) to (i) and (2)(a) to (j) of the SMA which conferred any 'duty' and 'power' on the MC to regulate the use and occupation of a 'parcel', let alone prohibit STR. Even before the voting regarding resolution No 3, there was nothing in the HR which allowed the plaintiff to prohibit STR. As such, the learned High Court judge had committed an error of law in deciding that the respondent could prohibit STR in respect of the parcels pursuant to the HR. Furthermore, the appellants had adduced sufficient evidence to prove on a balance of probabilities that the respondent's sixth AGM had passed resolution No 3 pursuant to s 70(2) of the SMA by way of 'special resolution'. In this regard, the wishes of 'not less than three-quarters of the valid votes cast' at the respondent's sixth AGM (which approved resolution No 3) should have been considered by the learned High Court judge (see paras 29, 31–33 & 35–36).

(5) The court opined that if any parcel owner or 'occupier' of a parcel (as defined in s 2 of the SMA) committed a tort of private nuisance which adversely affected the quiet enjoyment of the other parcel owners ('the aggrieved parcel owners'), used or occupied the parcel for an illegal purpose, and damaged the common property, the aggrieved parcel owners and the respondent may: (a) file a civil suit on the tort of private nuisance; and/or (b) lodge a police report (see para 37).

(6) The court's answers in relation to the agreed issues to be tried were as followed: (a) the first agreed issue — resolution No 3 had been lawfully passed at the respondent's sixth AGM pursuant to s 70(2) of the SMA; (b) the second agreed issue — in view of resolution No 3, the suit had not been lawfully filed by the respondent; (c) the third agreed issue — the respondent should have prepared the latest HR (which should incorporate resolution No 3 which had been passed at the respondent's sixth AGM) and should have filed the latest HR with the COB within 30 days from the date of the passing of resolution No 3 (as required by s 70(6) of the SMA); and (d) the fourth agreed issue — as resolution No 3 was in force, the respondent should have obtained the mandate and consent of the members of the respondent before filing the suit against parcel owners (see para 38(1)–(4)).

(7) With respect to the fifth agreed issue, as a general rule, a party who applied for an interlocutory injunction ('Y') was required to provide an undertaking to pay damages to the opposing party. This was clear from O 29 r 1(4) of the ROC which provided for Form 53 in Appendix A to RC to be the form for an interim injunction. In accordance with the said general rule, the court should consider Y's financial ability to satisfy the undertaking and may exercise its discretion to order Y to fortify the undertaking. Y had to apply to court for an exemption to provide the undertaking. The court had a discretion to dispense with the undertaking (see para 38(5)).

(8) As for the sixth agreed issue, the court found that r 2.1(a) of the HR was contrary to the express land condition. The court further found that the additional r 2.1(e) of the HR had expressly allowed the use of the parcels in accordance with the guidelines issued by the COB with regard to 'Aktiviti Penginapan Sementara Jangkamasa Pendek'. Rule 2.1(e) of the HR should prevail over r 2.1(a) of the HR because the former was the later provision passed by 'not less than three-quarters of the valid votes cast' at the respondent's sixth AGM. Such a decision was supported by the canon of construction, *lex posterior derogant non priori* (the subsequent provision shall prevail over the earlier provision) (see para 38(6)).

[Bahasa Malaysia summary

Responden adalah perbadanan pengurusan ('MC') sebuah pangsapuri yang dikenali sebagai MARC Service Residence ('pangsapuri tersebut'). Semasa mesyuarat agung tahunan ('AGM') keenam responden, terdapat pertikaian mengenai apa yang telah diluluskan berkenaan Agenda No 8, resolusi No 3 ('resolusi No 3') yang menyatakan bahawa pemilik unit dan pemajak hendaklah mematuhi garis panduan berkenaan penyewaan jangkamasa pendek ('STR') yang dikeluarkan oleh pesuruhjaya bangunan ('COB') berdasarkan Akta Pengurusan Strata 2013 ('APS') dan bahawa penalti sebanyak

RM200 akan dikenakan bagi setiap ketidakpatuhan kepada kaedah-kaedah dalaman ('HR') responden. Di Mahkamah Tinggi, responden memfailkan injunksi terhadap beberapa pemilik petak termasuk perayu pertama untuk melarang STR petak masing-masing ('saman tersebut'). Sementara menunggu pelupusan saman tersebut, Mahkamah Tinggi telah memberikan injunksi interlokutori ex parte dan seterusnya injunksi interlokutori inter parte untuk menghalang pemilik-pemilik petak daripada menggunakan petak mereka untuk STR. Perayu kedua tidak disaman oleh responden tetapi ia menyewa beberapa petak di pangsapuri tersebut dan terkilan dengan injunksi interlokutori yang diberikan, justeru, memohon untuk mencelah dalam saman tersebut. Apabila responden bersetuju dengan pencelahan oleh perayu kedua, perayu kedua memfailkan tuntutan balas terhadap responden dan ahli-ahlinya tetapi Mahkamah Tinggi, atas usulnya sendiri, membatalkan tuntutan balas tersebut dengan kebebasan untuk memfailkan semula. Berhubung dengan saman utama, isu-isu yang akan dibicarakan seperti yang dipersetujui oleh pihak-pihak semasa pengurusan kes sebelum bicara ('PKSB') adalah seperti berikut: (a) sama ada resolusi No 3 telah disokong semasa AGM keenam responden ('isu pertama yang dipersetujui'); (b) sama ada saman tersebut difailkan secara sah oleh responden terhadap pemilik-pemilik petak (defendan-defendan di Mahkamah Tinggi) ('isu kedua yang dipersetujui'); (c) sama ada responden telah menyediakan HR terkini yang menggabungkan resolusi No 3 ('k 2.1(e) HR') dan memfailkan HR terkini dengan COB ('isu ketiga yang dipersetujui'); (d) sama ada responden sebagai MC perlu mendapatkan mandat dan persetujuan ahli-ahli responden sebelum memfailkan saman terhadap pemilik-pemilik petak ('isu keempat yang dipersetujui'); (e) sama ada responden dikehendaki mematuhi aku janjinya semasa permohonan injunksi interlokutori untuk membayar ganti rugi kepada perayu ('isu kelima yang dipersetujui'); dan (f) sama ada k 2.1(a) HR (yang menyatakan bahawa unit-unit tersebut dibina untuk kediaman persendirian dan hendaklah digunakan secara eksklusif untuk tujuan kediaman persendirian sahaja) telah melanggar, pertama, syarat nyata penggunaan tanah yang memperuntukkan bahawa tanah tersebut hanya boleh digunakan untuk bangunan komersial bertingkat tinggi untuk tujuan pangsapuri servis, dan kedua, k 2.1(e) HR ('isu keenam yang dipersetujui'). Mahkamah Tinggi membenarkan saman tersebut, justeru, rayuan semasa. Penghakiman mahkamah dalam rayuan semasa menangani isu-isu baharu yang berikut: (i) sama ada MC kawasan pembangunan boleh melarang STR petak; dan (ii) sama ada mahkamah boleh, atas usulnya sendiri, membatalkan tuntutan balas oleh defendan di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') — isu ini juga melibatkan pemakaian dua peraturan keadilan asasi.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Aturan 18 k 19(1) KKM 2012 tidak memperuntukkan secara jelas bahawa mahkamah boleh menjalankan apa-apa kuasa dalam peruntukan tersebut atas usulnya sendiri. Di samping itu, jika mahkamah bertindak suo motu untuk membatalkan tuntutan balas, peraturan pertama keadilan asasi mungkin akan dimungkiri atas alasan bahawa: (a) mungkin wujud berat sebelah sebenar di pihak mahkamah; dan (b) dalam persepsi seorang pemerhati yang adil dan mengetahui, terdapat bahaya nyata berat sebelah di pihak mahkamah ('peraturan pertama keadilan asasi'). Terdapat juga pelanggaran yang jelas terhadap peraturan kedua keadilan asasi apabila perayu kedua tidak diberikan hak untuk didengar sebelum Mahkamah Tinggi membatalkan tuntutan balas tersebut (lihat perenggan 21–23).

(2) Keputusan Mahkamah Tinggi mengenai soalan-soalan yang bukan sebahagian daripada isu-isu yang dipersetujui untuk dibicarakan merupakan kekhilafan undang-undang yang memerlukan campur tangan rayuan kerana: (a) ia bertentangan dengan arahan PKSB hakim Mahkamah Tinggi yang bijaksana menurut A 34 k 2(2)(k) KKM 2012; (b) ia mungkin bertentangan dengan peraturan pertama keadilan asasi; dan (c) jika mahkamah ingin memutuskan isu-isu yang sebelum ini tidak dipersetujui oleh pihak-pihak semasa PKSB ('isu baharu tersebut'), mahkamah hendaklah memaklumkan kepada semua pihak berkenaan isu baharu tersebut bagi membolehkan pihak-pihak membuat persediaan dan menghujahkan isu baharu tersebut mengikut peraturan kedua keadilan asasi (lihat perenggan 27).

(3) Hakim Mahkamah Tinggi yang bijaksana tidak memutuskan isu kedua, ketiga, keempat dan kelima yang dipersetujui untuk dibicarakan. Peninggalan sedemikian berjumlah kepada kekhilafan undang-undang oleh Mahkamah Tinggi (lihat perenggan 28).

(4) Tiada apa-apa dalam APS dan Peraturan-Peraturan Pengurusan Strata (Penyenggaraan dan Pengurusan) 2015 ('PPS'), sama ada secara nyata atau mengikut implikasi yang perlu, yang melarang STR. Malah, tiada definisi STR pun dalam APS dan PPS. Perjanjian jual beli dan surat ikatan perjanjian bersama yang ditandatangani antara pembeli-pembeli dan pemaju juga tidak mengandungi apa-apa larangan STR. Di samping itu, tiada apa-apa dalam s 59(1)(a) hingga (i) dan (2)(a) hingga (j) APS yang memberikan apa-apa 'kewajipan' dan 'kuasa' kepada MC untuk mengawal selia penggunaan dan pendudukan 'petak', apatah lagi melarang STR. Malah sebelum pengundian mengenai resolusi No 3, tiada apa-apa dalam HR yang membenarkan plaintif melarang STR. Oleh itu, hakim Mahkamah Tinggi yang bijaksana telah melakukan kekhilafan undang-undang dalam memutuskan bahawa responden boleh melarang STR ke atas petak-petak tersebut menurut HR. Tambahan pula, perayu-perayu telah mengemukakan keterangan yang

mencukupi untuk membuktikan atas imbangan kebarangkalian bahawa AGM keenam responden telah meluluskan resolusi No 3 menurut s 70(2) APS melalui 'ketetapan khas'. Dalam hal ini, hasrat 'tidak kurang daripada tiga perempat daripada undi yang sah yang dibuat' pada AGM keenam responden (yang meluluskan resolusi No 3) sepatutnya dipertimbangkan oleh hakim Mahkamah Tinggi yang bijaksana (lihat perenggan 29, 31–33 & 35–36).

(5) Mahkamah berpendapat bahawa jika mana-mana pemilik petak atau 'penghuni' sesuatu petak (seperti yang ditakrifkan dalam s 2 APS) melakukan tort kacau ganggu persendirian yang menjejaskan hak pemilik-pemilik petak yang lain ('pemilik-pemilik petak yang terkilan') untuk menikmati petak mereka secara aman, menggunakan atau menduduki petak tersebut untuk tujuan yang menyalahi undang-undang, dan merosakkan harta bersama, pemilik-pemilik petak yang terkilan tersebut dan responden boleh: (a) memfailkan saman berdasarkan tort kacau ganggu persendirian; dan/atau (b) membuat laporan polis (lihat perenggan 37).

(6) Jawapan mahkamah berhubung isu-isu yang dipersetujui untuk dibicarakan adalah seperti berikut: (a) isu pertama yang dipersetujui — resolusi No 3 telah diluluskan secara sah pada AGM keenam responden menurut s 70(2) APS; (b) isu kedua yang dipersetujui — mengambil kira resolusi No 3, saman tersebut tidak difailkan secara sah oleh responden; (c) isu ketiga yang dipersetujui — responden sepatutnya telah menyediakan HR terkini (yang sepatutnya menggabungkan resolusi No 3 yang telah diluluskan pada AGM keenam responden) dan sepatutnya memfailkan HR terkini dengan COB dalam tempoh 30 hari dari tarikh kelulusan resolusi No 3 (seperti yang dikehendaki oleh s 70(6) APS); dan (d) isu keempat yang dipersetujui — memandangkan resolusi No 3 berkuat kuasa, responden sepatutnya mendapatkan mandat dan persetujuan ahli-ahli responden sebelum memfailkan saman terhadap pemilik-pemilik petak (lihat perenggan 38(1)–(4)).

(7) Berkenaan dengan isu kelima yang dipersetujui, sebagai peraturan am, pihak yang memohon injunksi interlokutori ('Y') dikehendaki memberikan aku janji untuk membayar ganti rugi kepada pihak lawan. Ini jelas daripada A 29 k 1(4) KKM 2012 yang memperuntukkan Borang 53 dalam Lampiran A hingga RC sebagai borang bagi injunksi interim. Selaras dengan peraturan am tersebut, mahkamah harus mempertimbangkan keupayaan kewangan Y untuk memenuhi aku janji tersebut dan boleh menggunakan budi bicaranya untuk memerintahkan Y untuk mengukuhkan aku janji tersebut. Y perlu memohon kepada mahkamah untuk mendapatkan pengecualian daripada memberikan aku janji tersebut. Mahkamah mempunyai budi bicara untuk mengecualikan pemberian aku janji tersebut (lihat perenggan 38(5)).

(8) Bagi isu keenam yang dipersetujui, mahkamah mendapati bahawa k 2.1(a) HR adalah bertentangan dengan syarat nyata tanah tersebut. Mahkamah selanjutnya mendapati k 2.1(e) HR yang dimasukkan telah secara nyata membenarkan penggunaan petak-petak mengikut garis panduan yang dikeluarkan oleh COB berkenaan dengan 'Aktiviti Penginapan Sementara Jangkamasa Pendek'. Kaedah 2.1(e) HR harus mengatasi k 2.1(a) HR kerana k 2.1(e) tersebut merupakan peruntukan terkemudian yang diluluskan oleh 'tidak kurang daripada tiga perempat daripada undi yang sah yang dibuat' pada AGM keenam responden. Keputusan sedemikian disokong oleh kaedah tafsiran, *lex posterior derogant non priori* (peruntukan seterusnya akan mengatasi peruntukan terdahulu) (lihat perenggan 38(6)).]

Cases referred to

Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp [2020] 12 MLJ 16, FC (folld)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)

Tan Kang Hai v Slimming Sanctuary Sdn Bhd [2016] MLJU 973; [2016] 5 MLRH 651, HC (refd)

YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11

Rules of Court 2012 O 15 r 6(2), 6(2)(a), (2)(b)(i), (2)(b)(ii), O 18 r 19(1), O 29 r 1(4), O 34 r 2(2)(k), O 42 r 12, Form 53

Strata Management (Maintenance and Management) Regulations 2015 Third Schedule

Strata Management Act 2013 ss 2, 59(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (1)(i), (2)(a), (2)(b), (2)(c), (2)(d), (2)(e), (2)(f), (2)(g), (2)(h), (2)(i), (2)(j), 70(2), (6), 148

Appeal from: *Marc Service Residence Management Corporation v Wawasan Raya (M) Sdn Bhd & Ors* [2023] MLJU 1384 (High Court, Kuala Lumpur)

Chow Li Kian (with Lee Jia Fu and Ho Yong Yi) (Josephine, LK Chow & Co) for the appellant.

Shahabudin bin Shaik Alaudin (with Rosnida bt Che Ibrahim, Siti Nurazwani bt Zulkeflee and Nadia bt Ahmad Suhaidin) (Shahabudin & Rozima) for the respondent.

Wong Kian Kheong JCA (delivering judgment of the court):

A. TWO NOVEL QUESTIONS

[1] This judgment raises two novel issues, namely:

(1) whether the 'management corporation' ('NIC') ('as defined in s 2 of the Strata Management Act 2013 ('the SMA')') of a 'development area' (as understood in s 2 of the SMA) can prohibit 'short term rental' ('STR') of 'parcels' (within the meaning of s 2 of the SMA) in the development area; and

(2) can a court on its own motion strike out a counterclaim by a defendant under O 18 r 19(1) of the Rules of Court 2012 ('the RC'). This question also concerns the application of the two rules of natural justice.

[2] I had forwarded a draft of this judgment ('draft') to See Mee Chun and Lim Chong Fong JJCA. Both my learned sister and brother had expressed their agreement with the draft.

B. BACKGROUND

[3] We shall refer to the parties as they were in the High Court.

[4] The plaintiff ('plaintiff') is the MC of a development area known as 'MARC Service Residence' ('apartment').

[5] The first defendant company ('first defendant') is the registered proprietor of three parcels in the apartment. The first defendant also rented five parcels in the apartment.

[6] On 26 June 2019, the sixth Annual General Meeting of the plaintiff was held ('plaintiffs sixth AGM'). At the plaintiffs sixth AGM, there was a dispute on what was passed with regard to agenda No 8, resolution No 3 ('resolution No 3').

C. PROCEEDINGS IN THE HIGH COURT

[7] The plaintiff filed a suit in the High Court ('this suit') against 202 defendants ('defendants') who own parcels ('parcels') in the apartment ('parcel owners').

[8] In this suit, the plaintiff's statement of claim prayed for the following relief, among others:

A (1) an injunction to compel the defendants to comply with the plaintiff's 'House Rules' ('HR') and the by-laws in the Third Schedule ('by-laws (Third Schedule)') to the Strata Management (Maintenance and Management) Regulations 2015 ('the SMR') governing the use of the parcels;

B (2) an injunction to restrain the defendants from violating the HR and the by-laws (Third Schedule) by 'managing, maintaining and/or operating' their parcels for, among others, STR;

C (3) an injunction to restrain the defendants from, among others 'advertising, contracting for booking and/or allowing dealing' their parcels for, among others, STR;

(4) an injunction to compel the defendants to remove all advertisements and listings from all internet websites and other media which offer the use of
D the defendants' parcels for, among others, STR;

(5) the defendants shall indemnify the plaintiff if proceedings are taken by the authorities against the plaintiff for violation of the HR and applicable laws;

E (6) an injunction to restrain the defendants from interfering with or preventing the plaintiff from performing the plaintiff's obligations under the SMA;

(7) general damages; and

F (8) costs on an indemnity basis.

[9] On 20 December 2019, the plaintiff obtained an ex parte interlocutory injunction from the learned High Court judge to restrain the defendants from
G using their parcels for STR until the disposal of this suit ('ex parte interlocutory injunction').

[10] The High Court subsequently granted an inter partes interlocutory injunction on 21 February 2020 on the same terms of the ex parte
H interlocutory injunction ('inter partes interlocutory injunction').

[11] The second appellant company ('second appellant'):

(1) rented several parcels;

I (2) was not sued by the plaintiff in this suit; and

(3) was aggrieved by the ex parte interlocutory injunction and inter partes interlocutory injunction. Hence, the second appellant applied to intervene in this suit as the 203rd defendant ('203rd defendant'). The

plaintiff consented to the intervention of the second appellant as the 203rd defendant in this suit.

[12] The 203rd defendant filed a counterclaim against the plaintiff and the members of the plaintiff's management committee ('203rd defendant's counterclaim').

[13] The High Court, on its own motion, struck out the 203rd defendant's counterclaim with liberty to file afresh and with no order as to costs ('High Court's *suo motu* striking out order (203rd defendant's counterclaim)').

[14] Only the first and 203rd defendants opposed this suit. All the other defendants in this suit ('other defendants') agreed to comply with the ex parte interlocutory injunction and inter partes interlocutory injunction. Hence, the plaintiff discontinued this suit against the other defendants.

[15] During the pre-trial case management ('PTCM') of this suit, upon the directions of the learned High Court judge, the plaintiff, first and 203rd defendants agreed to the following issues to be decided by the High Court ('agreed issues to be tried'):

(1) at the plaintiff's sixth AGM, was resolution No 3 voted upon and an additional para 2.1(e) added to the HR? ('first agreed issue to be tried');

(2) whether this suit was filed lawfully by the plaintiff against the defendants in this case ('second agreed issue to be tried');

(3) whether the plaintiff had prepared the latest HR ('which incorporated the new para 2.1(e) in the HR after the plaintiff's sixth AGM') and filed the latest HR with the Commissioner of Buildings of Kuala Lumpur ('COB') ('third agreed issue to be tried');

(4) whether the plaintiff as a MC needs to obtain the mandate and consent of the members of the plaintiff before filing this suit against the defendants ('fourth agreed issue to be tried');

(5) whether the plaintiff is required to comply with the undertaking given by the plaintiff during the interlocutory injunction application to pay damages to the first and 203rd defendants ('fifth agreed issue to be tried'); and

(6) whether r 2.1(a) of the HR ('The units are constructed for private residential dwellings and shall be used exclusively for private residential purpose only') has contravened:

   (a) the express condition of land use ('express land condition') on the title of the land on which the apartment is erected ('land'). According to the express land condition, the land should only be

used for a high-rise commercial building for the purpose of serviced apartments; and

(b) additional r 2.1(e) of the HR (which was approved at the plaintiffs sixth AGM),

('sixth agreed issue to be tried').

[16] At the trial of this case ('trial'):

(1) two witnesses gave evidence for the plaintiff, ie:

(a) Encik Ruslan bin Zainal Abidin ('PW1'), the property services manager of the apartment; and

(b) Datuk Affendi bin Zahari ('PW2'), the chairman of the plaintiff from 2019 to 2021.

(2) the following four witnesses testified for the first and 203rd defendants:

(a) Ms Foo May Lin ('SD1'), a practising advocate and solicitor. SD1 had acted for the plaintiff as follows, among others:

(i) SD1 drafted resolution No 3; and

(ii) SD1 attended the plaintiffs sixth AGM as the plaintiffs legal advisor;

(b) Encik Mohamad Akmal Nur Aliff bin Ahmad Tarmizi ('SD2'), the plaintiffs building supervisor. SD2 was present at the plaintiffs sixth AGM;

(c) Mr Ong Boon Cheow ('SD3'), the Managing Director of the first and 203rd defendants. SD3 was one of the attendees of the plaintiff's sixth AGM; and

(d) Mr Kek Soon Poh ('SD4'), the 17th defendant and owner of one parcel. SD4 had attended the plaintiff's sixth AGM.

[17] After the trial, the learned High Court judge allowed this suit and adjudged as follows:

(1) all the residential parcels in the apartment were prohibited from being used for commercial purpose or STR;

(2) a perpetual injunction was granted to compel all the defendants to comply with the HR and to restrain them from using the residential parcels in the apartment for commercial purpose or STR; and

(3) the first and 203rd defendants were ordered to pay costs of RM50,000 to the plaintiff (subject to allocatur fee of 4%),

('High Court's decision').

[18] According to the written judgment of the High Court ('High Court's written judgment'), among others:

(1) there is no definition of STR in law or any document which had been tendered in this suit but in general terms, STR suggests the rental of the premises for a short period of six months or less — para 13 High Court's written judgment;

(2) in a STR, the 'intention of the parties is not to rent out the premises for purpose of residence in the ordinary sense of the word, but more to allow for a stay for a certain purpose. Once the purpose is achieved the person staying leaves after paying for the number of days of stay' — para 14 High Court's written judgment;

(3) in paras 17 to 25 High Court's written judgment, the learned High Court judge considered:

   (a) the sale and purchase agreements ('SPAs') between the purchasers of the parcels ('purchasers') and the developer of the apartment ('developer'); and

   (b) the deed of mutual covenants signed by the purchasers and the developer ('DMCs').

(4) according to the High Court, from a reading of the SPAs and DMCs, the parcels 'are to be used for solely residential purposes' — paras 25 and 41 High Court's written judgment;

(5) if a person ('X') is not registered with the plaintiff as a 'resident' in the apartment, X is a 'trespasser' and cannot therefore reside in the apartment — paras 26 to 29 High Court's written judgment;

(6) the learned High Court judge gave reasons in paras 30 to 33 High Court's written judgment that the heading of r 2.1 of the HR and r 2.1(a) of the HR do not allow STR;

(7) in para 34 High Court's written judgment, the learned High Court judge held that the plaintiff's sixth AGM voted to impose a penalty of RM200 for each violation of the HR due to the frequency of the flouting of the HR as well as the 'creations of nuisance of the unsupervised number of persons' in the apartment due to the STR. The High Court dismissed the contention by the first and 203rd defendants that resolution No 3 was passed at the plaintiff's sixth AGM to allow STR — para 35 High Court's written judgment;

(8) the resolutions passed at the plaintiffs sixth AGM 'cannot supersede or contradict' the provisions of the DMC and HR which disallow the apartment to be used for commercial purposes — para 36 High Court's written judgment;

(9) the prohibition of STR in the HR cannot be overcome by the mere imposition of a penalty of RM200 or by passing a resolution in the plaintiffs sixth AGM — para 37 High Court's written judgment;

(10) covenant 3.02 DMC disallows nuisance in the parcels and common property of the apartment ('common property') — para 38 High Court's written judgment;

(11) in para 39 High Court's written judgment, the learned High Court judge referred to HR which prohibits the residents in the apartment from making any immoral, improper, offensive or unlawful use of the parcels and common property ('parcels/common property');

(12) the learned High Court judge found PW1 and PW2 to be 'truthful and reliable witnesses' — para 12 High Court's written judgment. The evidence of PW1 and PW2 showed that the use of the parcels in the apartment for STR had caused the following problems:

(a) abuse of the common property;

(b) immoral and illegal activities had been carried out in the parcels; and

(c) total disregard of the peaceful enjoyment of the parcels by their occupants,

— para 40 High Court's written judgment;

(13) the learned High Court judge decided in para 42 High Court's written judgment that the 'only way to uplift the restriction on STR is for the plaintiff to 'repeal and terminate the entire DMC and the [HR]'. However, the High Court in subsequent paras 43 to 46 High Court's written judgment, held that there is a 'host of legislation' which regulates premises used for residential and commercial purposes. According to the learned High Court judge, the by-laws (Third Schedule) prohibit the use of the parcels to cause nuisance to the other parcel owners; and

(14) as the apartment is a 'purely a private residential accommodation', the apartment 'cannot be utilised as a hotel or motel or for any such commercial purpose and cannot be advertised as such' — para 47 High Court's written judgment.

[19] The first and 203rd defendants had filed this appeal to the Court of Appeal against the High Court's decision ('this appeal').

OUR DECISION

D. WAS THE HIGH COURT'S SUO MOTU STRIKING OUT ORDER (203RD DEFENDANT'S COUNTERCLAIM) VALID?

[20] O 18 r 19(1) of the RC provides as follows:

> O 18 r 19 *Striking out pleadings* and endorsements
>
> (1) *The Court may at any stage of the proceedings order to be struck out* or amended *any pleading* or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, *on the ground that* —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> (e) and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. (Emphasis added.)

[21] Firstly, we are of the view that the court on its own motion cannot exercise any power provided in O 18 r 19(1) of the RC. This is because O 18 r 19(1) of the RC has not expressly provided that the court can exercise any of the powers in O 18 r 19(1) of the RC on its own motion. O 18 r 19(1) of the RC is to be compared with, eg, O 15 r 6(2) of the RC which empowers the court to make an order 'of its own motion' in O 15 r 6(2)(a), (b)(i) or (ii) of the RC. Reproduced below is O 15 r 6(2) of the RC:

> O 15 r 6(2) *Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application* —
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party to cease to be a party;
>
> (b) order any of the following persons to be added as a party, namely —
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. (Emphasis added.)

[22] There is a second reason why the High Court's *suo motu* striking out order (203rd defendant's counterclaim) is unlawful. When a party (Y) does not file an application to strike out a pleading of the other party (Z) and the court on its own motion strikes out Z's pleading, the first rule of natural justice may be contravened as follows:

(1) according to the first rule of natural justice, a judge must be:

(a) free from actual bias; or

(b) perceived by 'a fair-minded and informed observer' that there is no real danger of bias on the part of the judge — please refer to the judgment of the Federal Court delivered by Richard Malanjum CJ (Sabah and Sarawak) (as he then was) in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501, at p 525.

(2) in our adversarial system of litigation, it is up to parties to conduct their cases as they see fit. The judge should at all times remain an impartial umpire on the sidelines. If the court acts *suo motu* to strike out Z's pleading without any application by Y, the first rule of natural justice may be breached on the ground that there is actual bias by the court in favour of Y against Z; and/or

(3) even if the judge has no actual bias against Z in Y's favour, applying the test of a fair-minded and informed observer, there exists a real danger of bias on the part of the judge in favour of Y against Z. This is because when the court struck out the 203rd defendant's counterclaim without any application by the plaintiff, in the perception of a fair-minded and informed observer, there was a real danger of bias that the court had descended into the arena in favour of the plaintiff to the detriment of the 203rd defendant.

[23] Lastly, before the High Court's *suo motu* striking out order (203rd defendant's counterclaim) was made, the 203rd defendant was not afforded a right to be heard. There was a clear breach of the second rule of natural justice in this case.

[24] It is our hope that:

(1) in the interest of justice; and

(2) to ensure that the court's impartiality and integrity is not questioned or doubted in any manner,

— any pleading should not be struck out by the court without an application by the relevant party.

Even if a provision of written law has explicitly provided for the court to act on its own motion, we urge caution and the court should not act *suo motu*. This is because if the court acts on its own motion and a party is aggrieved by a *suo motu* decision ('S'), S may subsequently complain that the first rule of natural justice has been infringed. In such an event, there may not be a just, expeditious and economical disposal of the case.

E. WHETHER THE HIGH COURT COULD DECIDE ON ISSUES WHICH HAD NOT BEEN AGREED TO BY THE PARTIES

[25] The agreed issues to be tried are prepared pursuant to the learned High Court judge's own direction during PTCM according to O 34 r 2(2)(k) of the RC. We reproduce below O 34 r 2(2)(k) of the RC:

> O 34 r 2 *[PTCM] when directed by the Court*
>
> (1) ...
>
> (2) *At a [PTCM]*, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the *appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including —*
>
> ...
>
> (k) *the filing of a statement of issues to be tried*; (Emphasis added.)

[26] Despite the fact that the plaintiff, first and 203rd defendants had prepared the agreed issues to be tried on the PTCM direction of the learned High Court judge, the learned High Court judge decided on the following questions which were not part of the agreed issues to be tried:

(1) the High Court relied on the SPAs and DMCs to hold that the parcels were to be used solely for residential purposes;

(2) if an occupant in a parcel was not registered with the plaintiff as a 'resident', the occupant was a trespasser in the apartment;

(3) any resolution which is passed in the plaintiff's AGM cannot override the DMC and HR;

(4) learned High Court judge relied on:

  (a) nuisance;

  (b) immoral and/or unlawful use of the parcels;

  (c) total disregard of the quiet enjoyment of the parcels by their occupants; and

A (d) abuse of the common property to justify the High Court's decision,

(5) to uplift the prohibition on STR, only the plaintiff can repeal the DMC and HR; and

B (6) as the apartment was a 'purely a private residential accommodation', the apartment 'cannot be utilized as a hotel or motel or for any such commercial purpose and cannot be advertised as such'

('High Court's decision (issues which had not been agreed to by parties)').

C

[27] We are of the considered view that the High Court's decision ('issues which had not been agreed to by parties') is an error of law which warrants appellate intervention ('High Court's first legal error') because:

D (1) the High Court's decision (issues which had not been agreed to by parties) was contrary to the learned High Court judge's own PTCM direction pursuant to O 34 r 2(2)(k) of the RC;

(2) if a court wishes to decide on an issue which has not been previously E agreed to by the parties during the PTCM ('new issue'), in accordance with the second rule of natural justice, the court should inform all the parties regarding the new issue so as to enable the parties to prepare and submit on the new issue — please refer to *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973; [2016] 5 MLRH 651, at F para [11]; and

(3) our litigation is based on an adversarial system. If a court decides on a question which has not been previously agreed to by the parties pursuant to the court's own PTCM direction under O 34 r 2(2)(k) of the RC, this G may offend the first rule of natural justice as follows:

(a) there may exist actual bias on the part of the court; or

(b) in the perception of a fair-minded and informed observer, there is a real danger of bias on the part of the court.

H

F. WHETHER HIGH COURT HAD OMITTED TO DECIDE ON ISSUES WHICH HAD BEEN AGREED TO BY THE PARTIES

[28] Regrettably, the learned High Court judge did not decide on the I second, third, fourth and fifth agreed issues to be tried. Such an omission is tantamount to a legal error on the part of the High Court ('High Court's second legal error').

G. IS STR PROHIBITED BY SMA AND SMR?

[29] We have perused the SMA and SMR, in particular the by-laws (Third Schedule). There is nothing in the SMA and SMR, either expressly or by necessary implication, which prohibits STR. In fact, there is not even a definition of STR in the SMA and SMR. We rely on the following judgment of Mahadev Shankar JCA in the Court of Appeal case of *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621, at p 667:

> *Whether the contracts were illegal or otherwise is a matter for this court to decide. The trial judge found as a fact that these contracts were valid because prior to the KLSE circular, there was nothing in the KLSE rules prohibiting such contracts.*
>
> *We agree. We would go further and state that what the law does not specifically prohibit, it permits.* (Emphasis added.)

H. WHETHER MCS CAN PROHIBIT STR WITH REGARD TO PARCELS

[30] The 'duties?' and 'powers' of a MC are stipulated in s 59(1)(a) to (i) and (2)(a) to (j) of the SMA. We reproduce below s 59(1)(a) to (i) and (2)(a) to (j) of the SMA:

s 59 *Duties and powers of [MC]*

(1) *The duties of a [MC] shall be as follows*:

(a) to properly maintain and manage the subdivided building or land and the common property and keep it in a state of good and serviceable repair;

(b) to determine and impose the Charges to be deposited into the maintenance account for the purposes of proper maintenance and management of the subdivided buildings or lands and the common property;

(c) to determine and impose the contribution to the sinking fund to be deposited into the sinking fund account for the purposes of meeting the actual or expected expenditure specified under subsection 51(2);

(d) to effect insurance according to this Act or to insure against such other risks as the proprietors may by special resolution direct;

(e) to comply with any notice or order given or made by the local authority or any competent public authority requiring the abatement of any nuisance on the common property, or ordering repairs or other work to be done in respect of the common property or other improvements to the common property;

(f) to prepare and maintain a strata roll for the subdivided buildings or lands;

(g) to ensure that the accounts required to be maintained by the management corporation under this Act are audited and to provide audited financial statements for the information to its members;

(h) to enforce the by-laws; and

(i) to do such other things as may be expedient or necessary for the proper maintenance and management of the subdivided buildings or lands and the common property

(2) *The powers of the [MC] shall be as follows:*

(a) to collect the Charges from the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks;

(b) to collect the contribution to the sinking fund from the proprietors of an amount equivalent to ten percent of the Charges;

(c) to authorize expenditure for the carrying out of the maintenance and management of the subdivided buildings or lands and the common property;

(d) to recover from any proprietor any sum expended by the management corporation in respect of that proprietor's parcel in complying with any such notice or order as referred to in paragraph (1)(e);

(e) to purchase, hire or otherwise acquire movable property for use by the proprietors in connection with their use and enjoyment of the common property;

(f) to employ or arrange and secure the services of any person or agent to undertake the maintenance and management of the common property of the subdivided building or land;

(g) subject to subsection 70(2), to make additional by-laws for the proper maintenance and management of the subdivided buildings or lands and the common property;

(h) to borrow moneys required by the management corporation in the exercise of its powers or the performance of its duties;

(i) to secure the repayment of moneys borrowed by it and the payment of interest thereon by negotiable instrument or by a charge of unpaid Charges to the maintenance account (whether already imposed or not), or by a charge of any property vested in it or by a combination of any of those means; and

(j) to do all things reasonably necessary for the performance of its duties under [SMA] and for the enforcement of the by-laws. (Emphasis added.)

[31] There is nothing in s 59(1)(a) to (i) and (2)(a) to (j) of the SMA which

confers any 'duty' and 'power' on MCs, including the plaintiff, to regulate the use and occupation of a 'parcel' (as defined in s 2 of the SMA), let alone prohibit STR with regard to the parcels. At the risk of repetition, there is no definition of STR in SMA.

[32] In our considered view, even before the voting regarding resolution No 3 in the plaintiffs sixth AGM, there is nothing in the HR which allows the plaintiff to prohibit STR in respect of the use of the parcels. Our reasons are as follows:

(1) there is no definition of the STR in the HR; and

(2) according to r 2.1(a) of the HR:

> *The Units are constructed for private residential dwellings and shall be used exclusively for private residential purpose only*. (Emphasis added.)

r 2.1(a) of the HR does not confer any right or power on the plaintiff to prohibit STR.

[33] As explained in the above paras 30 to 32, the learned High Court judge had committed an error of law in deciding that the plaintiff could prohibit STR in respect of the parcels pursuant to the HR ('High Court's third legal error').

[34] Section 70(2) of the SMA provides as follows:

> 70(2) *A [MC] may, by special resolution, make additional bylaws or make amendments to such additional by-laws, not inconsistent with the by-laws prescribed by the regulations made under section 150, for regulating the control*, management, administration, *use and enjoyment of the subdivided building or land and the common property*, including all or any of the following matters;
>
> (a) safety and security measures;
>
> (b) details of any common property of which the use is restricted;
>
> (c) the keeping of pets;
>
> (d) parking;
>
> (e) floor coverings;
>
> (f) refuse control;
>
> (g) behaviour;
>
> (h) architectural and landscaping guidelines to be observed by all proprietors; and
>
> (i) imposition of fine not exceeding two hundred ringgit against any proprietor, occupant or invitee who is in breach of any of the by-laws. (Emphasis added.)

The first and 203rd defendants had adduced sufficient evidence, namely:

(1) video recordings of the plaintiff's sixth AGM;

(2) minutes of the plaintiff's sixth AGM; and

(3) the oral evidence of four witnesses who attended the plaintiff's sixth AGM, ie, SD1, SD2, SD3 and SD4,

— to prove on a balance of probabilities that the Plaintiff's sixth AGM had passed resolution No 3 pursuant to s 70(2) of the SMA by way of a 'special resolution' (defined in s 2 of the SMA as 'a resolution which is passed at a duly convened general meeting of which at least twenty-one days' notice specifying the proposed resolution has been given, and carried by a majority consisting of not less than three-quarters of the valid votes cast at the general meeting by a show of hands, or if a poll is demanded and taken, by a majority consisting of not less than three-quarters in number of the valid votes cast on such poll').

Resolution No 3 stated as follows:

> 1. *The Unit Owner and lessee shall comply to [sic] the guideline (Prosedur Operasi Standard Aktiviti Penginapan Sementara Jangkamasa Pendek Kepada Pemaju/JMB/MC di Wilayah Persekutuan) issued by [COB KL] in line with [SMA].*
>
> 2. *To impose a penalty of RM200.00 for each non-compliance to [sic][HR].*
>
> 3. All penalties shall be payable and a debt due to [MC] by the Unit Owner. (Emphasis added.)

[35] Resolution No 3 is significant because resolution No 3 had been approved by way of a special resolution (as defined in s 2 of the SMA). The wishes of 'not less than three-quarters of the valid votes cast' at the plaintiff's sixth AGM (which approved resolution No 3) should have been considered by the learned High Court judge in this case ('High Court's fourth legal error'). We rely on the following Federal Court's judgment delivered by Tengku Maimun CJ in *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* [2020] 12 MLJ 16, at para [26]:

> [26] *The [SMA] is without doubt, a social legislation. It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the [SMA] which safeguard community interests ought to receive a libera! interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in Ang Ming Lee and Hoh Kiang Ngan*. (Emphasis added.)

[36] We have not overlooked the SPAs and DMCs. The SPAs and DMCs, in

our view, did not contain any prohibition of STR with regard to the parcels. In any event, upon the enforcement of the HR, the SPAs and DMCs *'shall cease to have effect* as provided by s 148 of the SMA. We reproduce below s 148 of the SMA:

> s 148 *Non-application of other written laws, contracts and deeds*
>
> *On the coming into operation of [SMA], in a local authority area or part of a heal authority area or in any other area, the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect within the local authority area or that other area*. (Emphasis added.)

Premised on the above reasons, the learned High Court judge had committed an error law in misconstruing the SPAs and DMCs in this case ('High Court's fifth legal error').

I. ADEQUATE LEGAL REMEDIES FOR TORT OF PRIVATE NUISANCE AND ILLEGAL USE OF PARCELS

[37] We have to emphasize that if any parcel owner or 'occupier' of a parcel (as defined in s 2 of the SMA as a 'person in actual occupation or control of the parcel or land parcel, but, in the case of a premises for lodging purposes, does not include a lodger'):

(1) commits a tort of private nuisance which adversely affects the quiet use and enjoyment of the other parcel owners ('aggrieved parcel owners');

(2) uses or occupies the parcel for an illegal purpose; and

(3) damages the common property; and

(4) the aggrieved parcel owners and plaintiff may:

  (a) file a civil suit based on the tort of private nuisance; and/or

  (b) lodge a police report.

J. OUR ANSWERS TO THE AGREED ISSUES TO BE TRIED

[38] Premised on the evidence adduced in this case, we answer the agreed issues to be tried as follows:

(1) the first agreed issue to be tried — resolution No 3 had been lawfully passed at the plaintiffs sixth AGM pursuant to s 70(2) of the SMA;

(2) the second agreed issue to be tried — in view of resolution No 3, this suit had not been lawfully filed by the plaintiff;

(3) the third agreed issue to be tried — the plaintiff should have prepared the

latest HR (which should incorporate resolution No 3 which had been passed at the plaintiffs sixth AGM) and should have filed the latest HR with the COB within 30 days from the date of the passing of resolution No 3 (as required by s 70(6) of the SMA);

(4) the fourth agreed issue to be tried — as resolution No 3 is in force, the plaintiff should have obtained the mandate and consent of the members of the plaintiff before filing this suit against the defendants;

(5) with regard to the fifth agreed issue to be tried:

(a) as a general rule ('general rule'), a party (T) who applies for an interlocutory injunction, be it an ex parte or inter partes interlocutory injunction, is required to provide an undertaking to pay damages ('undertaking') to the opposing party ('U'). This is clear from O 29 r 1(4) of the RC which provides for Form 53 in Appendix A to the RC ('Form 53') to be the form for an interim injunction. We reproduce below O 29 r 1(4) of the RC and Form 53

> O 29 r 1(4) An order for interim injunction shall be in Form 53,
>
> Form 53
>
> ORDER FOR INTERIM INJUNCTION (O 29, r 1)
>
> (Title as in action)
>
> Upon the application of ... and *upon* reading the affidavit ... filed the ... day of ..., 20 ..., and upon hearing ... and *the plaintiff by his said ... undertaking to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge should hereafter be of opinion that the defendant ... shall have sustained any by reason of this order which the plaintiff ought to pay*. It is ordered and directed that the defendant(s) (a) ... by himself (themselves) his (their) agents or servants or otherwise be restrained, and an Injunction is hereby granted restraining him (them) from .... (Emphasis added.)

(b) in accordance with the general rule, the court should consider Y's financial ability to satisfy the undertaking and may exercise its discretion to order Y to fortify the undertaking — please refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, at p 207; and

(c) Y has to apply to court for an exemption to provide the undertaking. The court has a discretion to dispense with the undertaking — *Keet Gerald*, at p 207; and

(6) as for sixth agreed issue to be tried:

(a) r 2.1(a) of the HR is contrary to the express land condition; and

(b) the additional r 2.1(e) of the HR has expressly allowed the use of the parcels in accordance with the guidelines issued by the COB with regard to 'Aktiviti Penginapan Sementara Jangkamasa Pendek'. Rule 2.1(e) of the HR should prevail over r 2.1(a) of the HR because the former is the later provision passed by 'not less than three-quarters of the valid votes cast' at the plaintiffs sixth AGM. Such a decision is supported by the canon of construction, *lex posterior derogant non priori* (the subsequent provision shall prevail over the earlier provision).

K. OUTCOME OF THIS APPEAL

[39] Premised on the above evidence and reasons, especially the High Court's first to fifth legal errors, we allow this appeal with the following order:

(1) the entire High Court's decision is set aside; and

(2) we enter judgment in favour of the first and 203rd defendants against the plaintiff as follows:

(a) this suit against the first and 203rd defendants is dismissed;

(b) a sum of RM80,000 shall be paid by the plaintiff to the first and 203rd defendants as costs for this suit and this appeal;

(c) an assessment of damages ('assessment (damages)') for all loss suffered by the first and 203rd defendants due to:

(i) ex parte interlocutory injunction;

(ii) inter partes interlocutory injunction; and

(iii) the perpetual injunctions granted in the High Court's decision shall be conducted by another High Court judge or judicial commissioner ('J/JC'),

(d) the costs of the assessment (damages) shall be determined by the J/JC and shall be paid by the plaintiff to the first and 203rd defendants; and

(e) by virtue of s 11 of the Civil Law Act 1956 and O 42 r 12 of the RC, the J/JC has a discretion to award interest on the sum of damages assessed at the assessment (damages) and such interest shall be paid by the plaintiff to the first and 203rd defendants.

A *Appeal allowed; High Court's decision set aside.*

Reported by Dzulqarnain Ab Fatar

B

C

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